

No. 7826

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United States

Circuit Court of Appeals

For the Ninth Circuit.

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CALIFORNIA BARREL COMPANY, INC.,  
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Upon Petition to Review an Order of the United States  
Board of Tax Appeals

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FILED

APR 19 1935

PAUL F. O'BRIEN,  
CLERK



No. 7826

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES :

For Petitioner:

FREDERICK C. ROHWERDER, Esq.,

T. H. LAWRENCE, Esq.,

(Withdrawn)

ALLEN G. WRIGHT, Esq.,

RANDALL LARSON, Esq.,

GEO. E. H. GOODNER, Esq.,

D. F. PRINCE, Esq.

For Respondent:

ALLIN H. PIERCE, Esq.,

IRVING M. TULLAR, Esq.

Docket No. 47419

CALIFORNIA BARREL COMPANY, INC.,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DOCKET ENTRIES:

1930

- Feb. 10—Petition received and filed. Taxpayer notified. (Fee paid)  
Feb. 11—Copy of petition served on General Counsel.  
Apr. 7—Answer filed by General Counsel.  
Apr. 10—Copy of answer served on taxpayer—Circuit Calendar.

1933

- July 3—Hearing set in San Francisco, California, beginning Sept. 11, 1933.  
Aug. 29—Notice of appearance of T. H. Lawrence as counsel for taxpayer filed.  
Sept. 15—Hearing had before Mr. Van Fossan (assigned to Mr. Leach) on merits. Submitted to Mr. Leach for report. Stipulation of facts filed. Petitioner's brief due Oct. 14, 1933—respondent's brief due Nov. 14, 1933.  
Oct. 4—Transcript of hearing of Sept. 15, 1933 filed.  
Oct. 11—Motion for 15 days extension to file briefs filed by taxpayer.



## 1933

- Oct. 12—Motion for 15 days extension to file briefs granted to both parties.
- Oct. 30—Brief filed by taxpayer. 10/30/33 copy served on General Counsel.
- Nov. 29—Brief filed by General Counsel.
- Dec. 29—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 12/29/33 granted.

## 1934

- Jan. 8—Copy of reply brief served on General Counsel.
- Nov. 7—Memorandum opinion rendered—J. Russell Leech, Division 6. Judgment will be entered for the respondent.
- Nov. 8—Decision entered—J. Russell Leech, Division 6.

## 1935

- Jan. 4—Notice of the withdrawel of T. H. Lawrence, counsel for taxpayer, filed.
- Jan. 5—Motion to fix amount of bond filed by taxpayer.
- Jan. 5—Order fixing amount of bond at \$24,000 entered.
- Jan. 5—Notice of the appearance of Geo. E. H. Goodner and D. F. Prince, counsel for taxpayer, filed. [1]\*
- Jan. 29—Notice of the appearance of Randell Larson, counsel for taxpayer, filed.
- Jan. 29—Supersedeas bond in the amount of \$24,000. approved and ordered filed.

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

1935

- Jan. 29—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.
- Jan. 29—Proof of service filed.
- Jan. 29—Statement of evidence lodged.
- Jan. 29—Notice of lodgment of statement of evidence with hearing notice of Feb. 13, 1935 filed.
- Feb. 12—Motion to continue hearing to Feb. 27, 1935 filed by taxpayer. 2/12/35 granted.
- Feb. 23—Order from 9th Circuit to transmit certain original exhibits filed.
- Feb. 26—Agreed statement of evidence approved and ordered filed.
- Feb. 26—Praecipe filed with proof of service thereon.
- Mar. 26—Order enlarging time to April 15, 1935 for transmission and delivery of record entered. [2]

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United States Board of Tax Appeals

Docket No. 47419

CALIFORNIA BARREL COMPANY, INC.,  
Petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency (IT:AR:C-1:JMK-60D), dated December 12, 1929, and as a basis for its proceeding alleges as follows:

1. The petitioner is a California corporation, with its principal office at 433 California Street, San Francisco, California.

2. The notice of deficiency (a copy of which is hereto attached and marked "Exhibit A") was mailed to the petitioner on December 12, 1929. The details resulting in the deficiency shown are set forth in a separate communication addressed to the California Barrel Co. (a copy of which is hereto attached and marked "Exhibit B") dated December 12, 1929.

3. The taxes in controversy are income and profits taxes for the calendar year 1927, and for \$14,915.65.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following error:

(a) Respondent erred in failing and refusing to permit the petitioner to deduct from gross income during the calendar year 1927, the sum of \$306.-348.56, representing a net loss incurred during the calendar year 1925. [3]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner is engaged in the manufacture and sale of barrels and cooperage.

(b) The amount of the net loss is not in dispute, the sole question at issue being its deductibility in the 1927 income tax return.

(c) The affairs of the California Barrel Co., incorporated January 18, 1906, hereinafter referred to as "A" company, were reorganized by the formation of a new corporation, known as the California Barrel Company, Inc., incorporated February 15, 1924, hereinafter referred to as "B" company.

(d) "B" company has an authorized capital stock of 18,000 shares, divided into 9,000 shares of preferred capital stock of a par value of \$100.00 per share, and 9,000 shares of common capital stock of no par value, only 1,000 shares of the common stock being issued. The preferred and common stock have equal voting rights.

(e) "A" company transferred on August 28, 1924, all of its net assets including goodwill to "B" company in exchange for 9,000 shares of preferred stock. 1,000 shares of common stock of "B" company were issued to "A" company's stockholders.

(f) The California Supreme Court decided on July 29, 1925 (*Del Monte Light & Power Co. v. Jordan*, 196 Cal. 448), that California corporations could not issue shares both with and without par value.

(g) In compliance with this decision, and by reason of the licensing authority of the State of California, "B" company, against its will, was compelled to reorganize and did so by reincorporating



under California laws on December 19, 1925, under the name of California Barrel Company, Inc., hereinafter referred to as "C" company. [4]

(h) On December 31, 1925, "B" company transferred all of its net assets, including goodwill, to "C" company in exchange for 9,000 shares of preferred, and 250 shares of common stock, both of \$100.00 par value and with equal voting rights. The "C" company common stock was issued pro rata to the "B" company common stockholders, and the preferred stock to "A" company.

(i) Except for the retirement of 270 shares of "C" company preferred stock on September 30, 1926, no change has occurred in "A" company's ownership in "C" company.

(j) "A", "B", and "C" companies are and always have been close corporations controlled by the Koster family.

(k) For the calendar year 1925, "A" and "B" company filed separate income tax returns. "A" company reported \$13,500.00 dividends received from "B" company and had no other income or expenses. "B" company reported a loss of \$504,572.66, which after deducting \$70,000 received in dividends, made a statutory net loss of \$504,502.66.

(l) For the calendar years 1926 and 1927, "A" and "C" companies filed consolidated income tax returns.

(m) In the 1927 consolidated tax return, there was deducted the amount of \$306,348.56 represent-

ing the portion of "B" company's 1925 statutory net loss in excess of the 1926 consolidated net income.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the taxpayer is entitled, in computing its net income for the calendar year 1927, to deduct the amount of \$306,348.56.

(Signed) FREDERICK C. ROHWERDER

(Signed) ALLEN G. WRIGHT

Counsel for Petitioner.

February 5th, 1930. [5]

State of California,

City and County of San Francisco—ss

F. J. KOSTER, being duly sworn, says that he is the President of California Barrel Company, Inc., the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein and that the facts therein stated are true.

(Signed) F. J. KOSTER

Subscribed and sworn to before me this fifth day of February, 1930.

(Signed) M. V. COLLINS

Notary Public in and for the City and County of San Francisco, State of California [6]

EXHIBIT A

COPY

TREASURY DEPARTMENT  
WASHINGTON

SEAL

Office of  
Commissioner of Internal Revenue

---

Address reply  
Commissioner of Internal Revenue  
And refer to

IT:AR:C-1

JMK-60D

Dec. 12, 1929.

California Barrel Company, Inc.,  
433 California Street,  
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1927, discloses a deficiency of \$14,915.65, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of

this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to join in executing the consolidated Form 866 enclosed in a separate communication of even date addressed to California Barrel Company, 433 California Street, San Francisco, California. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,

Commissioner.

(Signed) By DAVID BURNET

Deputy Commissioner.

Enclosures:

Statement

Form 882 [7]



COPY

IT:AR:C-1

JMK-60D

STATEMENT OF RETURNS EXAMINED.

Company	Year	Form
California Barrel Company, Inc., 433 California Street, San Francisco, California.	1927	1122
		Filed with Consolidated return of California Barrel Company.

Tax Liability.

California Barrel Company, Inc.,			
Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1927	\$14,915.65	None	\$14,915.65

Full details resulting in the deficiency shown are contained in a separate communication addressed to California Barrel Company. [8]

EXHIBIT B

COPY

TREASURY DEPARTMENT  
WASHINGTON

SEAL

Office of  
Commissioner of Internal Revenue

---

Address reply to  
Commissioner of Internal Revenue  
And refer to

Dec. 12, 1929.

IT:AR:C-1

JMK-60D

California Barrel Company,  
433 California Street,  
San Francisco, California.

Sirs:

You are advised that the determination of your tax liability for the year 1927, discloses no additional tax due as shown in the attached statement.

In accordance with Section 274 of the Revenue Act of 1926, the Bureau has advised the company against which a deficiency is shown in the attached statement of its right to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of the letter, for a redetermination of its tax liability.

If you acquiesce in the findings of the Unit, you

are requested to join in executing the enclosed Consolidated Form 866.

Respectfully,  
 DAVID BURNET,  
 Deputy Commissioner.  
 (Signed) By H. B. ROBINSIN.  
 Head of Division.

Enclosures:

Statement  
 Form 866-CR  
 Schedules 1 to 4, incl. [9]

COPY

IT:AR:C-1  
 JMK-60D

STATEMENT OF RETURNS EXAMINED

Company	Year	Form
California Barrel Company, 433 California Street, San Francisco, California.	1927	1120 (Consolidated)

California Barrel Company, Inc., San Francisco, California.	1927	1122
--	------	------

Tax Liability  
 California Barrel Company, Inc.

Year	Corrected Tax Liability	Tax Previously Assessed	Overas- sessment	Deficiency
1927	\$14,915.65	None	None	\$14,915.65

Full details resulting in the deficiency shown above are disclosed in attached Schedules 1 to 4, inclusive.

Your protest of July 11, 1929, against the findings disclosed in Bureau letter of June 13, 1929, has been considered in connection with a conference held in San Francisco, California, August 13, 1929, and your protest of October 17, 1929, has been considered in connection with a conference held in Washington, D. C., November 8, 1929, but your contentions are not conceded by this office.

The deficiency shown above has been allocated to California Barrel Company, Inc., the company disclosing taxable income. [10]

COPY

California Barrel Company,

Year ended December 31, 1927.

Schedule 1

Net Income

Net loss as disclosed by consolidated	
return	\$39,060.00
As corrected—loss	39,060.00
	<hr/>
Net adjustment	No change

## Schedule 2

## California Barrel Company, Inc.

## Net Income

Net loss as disclosed by consolidated return	\$156,802.23
As corrected—income	149,546.33
	<hr/>
Net adjustment	\$306,348.56
Unallowable deductions and additional income:	
(a) Prior year's loss	\$306,348.56

## Schedule 2-A

## Explanation of Items Changed

- (a) California Barrel Company, incorporated January 18, 1906, and California Barrel Company, Inc., incorporated December 19, 1925 (continuation of California Barrel Company, Inc., incorporated February 15, 1924), has each been ruled not affiliated for the year 1925.

For the year 1925 each company, California Barrel Company and California Barrel Company, Inc., filed separate returns. For the years 1926 and 1927 these companies filed consolidated returns and they have been ruled affiliated for 1926 and 1927. The Bureau holds that the net loss of the California Barrel Company, Inc., (incorporated February 15, 1924) for the year 1925 of \$306,348.56, cannot be allowed against the gross income for 1927 since

different taxable entities existed in these years due to the fact that different corporations composed the affiliated group in each year. [11]

## COPY

California Barrel Company.

Year ended December 31, 1927.

## Schedule 3.

## Consolidated Net Income.

Net Income corrected:

California Barrel Company, Inc.	\$149,546.33
---------------------------------	--------------

Net loss corrected:

California Barrel Company.	39,060.00
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Consolidated net income	\$110,486.33
-------------------------	--------------

## Schedule 4.

## Computation of Income Tax.

Consolidated Net Income	\$110,486.33
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Income tax 13½%	14,915.65
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Previously assessed	None
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Additional tax to be assessed	\$14,915.65
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[Endorsed]: Filed Feb. 10, 1930. [12]



[Title of Court and Cause.]

### ANSWER

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition heretofore filed in this appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4 (a). Denies that the respondent committed the errors alleged in paragraph 4 (a) of the petition.

5 (a). Admits the allegations contained in paragraph 5 (a) of the petition.

5 (b). Denies the allegations contained in paragraph 5 (b) of the petition.

5 (c) to (l); inclusive. For lack of information upon which to base a belief denies the allegations contained in subparagraphs (c) to (l), inclusive, of paragraph 5 of the petition.

5 (m). Admits that in the return of the petitioner for the year 1927 there was deducted from gross income the sum of \$306,348.56 as a portion of an alleged net loss of another corporation for the year 1925. Denies the remaining allegations contained in paragraph 5 (m). [13]

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE it is prayed that the petition be denied.

(Signed) C. M. CHAREST  
General Counsel, Bureau of Internal Revenue.

OF COUNSEL:

L. W. CREASON,  
Special Attorney,  
Bureau of Internal Revenue.

[Endorsed]: Filed April 7 1930. [14]

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[Title of Court and Cause.]

T. H. Lawrence, Esq., and Allen G. Wright Esq.  
for petitioner.

Allin H. Pierce, Esq., and Irving M. Tullar, Esq.,  
for respondent.

MEMORANDUM OPINION.

LEECH; This proceeding seeks redetermination of an asserted income tax deficiency of \$14,915.65 for the calendar year 1927.

Petitioner assigns as error the respondent's disallowance of a deduction of \$306,348.56 as a net loss incurred during the year 1925. The amount of the alleged net loss is also in issue.

The parties have stipulated the facts out of which the controversy arises. We set forth only those



facts sufficient for a determination of the principal issue, namely, whether petitioner is entitled to the deduction claimed.

All three corporations involved in the transactions hereinafter set forth were organized under the laws of California for the purpose [15] of engaging in the manufacture and sale of barrels and cooperage.

California Barrel Co. (hereinafter referred to as "A" company) was organized in 1906.

California Barrel Company, Inc., (hereinafter referred to as "B" company) was organized on February 15, 1934, for a term of 50 years, with a capital structure of 9,000 shares of voting preferred stock of \$100 par value each, and 9,000 shares voting common stock of no par value. Under date of August 28, 1924, the "A" company, pursuant to authority of its directors, stockholders and creditors, transferred all of its business, assets, goodwill, etc., to the "B" company which issued therefor 9,000 shares of preferred stock to "A" company, 995 shares of common stock to the stockholders of "A" company as the latter's nominees, and 5 shares of common stock, as qualifying shares, to the incorporators and directors of "B" company, who were also the directors of "A" company. The remaining authorized capital stock of "B" company was not issued. The "B" company assumed all of the liabilities of "A" company, except certain debts arising out of the latter's liability as a stockholder of a certain insolvent corporation. The transaction

was entered into for the purpose of paying such debts, and upon receipt of "B" company's stock, "A" company executed a trust agreement for the benefit of its remaining creditors. The "A" company continued its corporate existence and paid its annual franchise taxes. [16]

On July 29, 1925, the Supreme Court of California in *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488; 238 Pac. 710, held that, pursuant to the State Constitution and Civil Code, the preferred and common shares of a California corporation must have the same par value, and that such must be required of those seeking to organize a corporation or to amend the articles of corporations already organized. Following that decision, "B" company tendered to the Secretary of State of California, amended Articles providing that its no par value common stock should have a par value of \$100 per share, as did its then outstanding preferred shares. The Secretary of State refused to permit the filing of such amendment, and subsequently, in December, 1925, he refused to issue to "B" company the required statutory license to do business for the year 1926, although the prescribed license fee was tendered.

Under date of December 10, 1925, the "B" company sold certain assets transferred to it by "A" company (namely stock of the Koster Products Company) at an alleged loss of \$846,461.85, resulting in an alleged net loss of \$504,572.66 for the taxable year 1925.

To provide a means for continuing the business during 1926, the "B" company caused to be organized on December 19, 1925, for a term of 50 years, the California Barrel Company, Inc., (hereinafter [17] referred to as "C" Company) the petitioner herein. The "C" company's authorized capital stock consisted of 9,000 shares of preferred and 9,000 shares of common stock, both of the par value of \$100 each and both having voting rights.

A deed of conveyance, executed on December 29, 1925, by "B" company as first party and grantor, by "A" company as second party, and by "C" company as third party and grantee, transferred as of December 31, 1925, all of "B" company's assets to "C" company. In consideration therefor, "C" company assumed all of "B" company's liabilities and issued its capital stock as follows: 9,000 shares of preferred stock to "A" company; 125 shares of common stock to F. J. Koster; 125 shares of common stock to B. J. Critcher as trustee for the stockholders of "A" company other than F. J. Koster, and 5 shares of common stock, as qualifying shares, to its incorporators and directors. The remaining authorized capital stock of "C" company was not issued. It is stipulated that: "No steps have been taken to dissolve the "B" company and no decree of court dissolving the same has ever been entered."

Upon receipt of "C" company's stock, the "A" company executed a new trust agreement for the benefit of its creditors. Except for the retirement on September 30, 1926, of 270 shares of preferred



stock held by the "A" company, no change has occurred in its stock ownership of "C" company's stock. [18]

The "A", "B" and "C" companies each filed a separate tax return for the year 1925. The "A" company and "C" company filed consolidated returns for the years 1926 and 1927, but neither company applied for nor received, from the Commissioner of Internal Revenue, formal permission to file such returns for those years. On its return for the calendar year 1925, the "B" company reported a net loss of \$504,572.66. The "B" company filed no returns for the years 1926 and 1927. On the consolidated return filed by "A" and "C" companies for the calendar year 1927, the "C" company (petitioner herein) claimed a statutory net loss deduction in the amount of \$306,348.56 as a portion of the alleged net loss reported on "B" company's return for the year 1925. In determining the deficiency in controversy, the respondent disallowed such deduction on ground that the alleged net loss was not sustained by this petitioner.

The facts and contentions here involved are similar to those in *New Colonial Ice Co. Inc. v. Helvering*, 292 U. S. 435, decided subsequent to the submission of this proceeding. There the Court was construing sec. 204 (b) of the Revenue Act of 1921, which, for all intents and purposes, is the same as sec. 206 (b) of the Revenue Act of 1926, the applicable provision here. After stating that the extent of deductions from gross income depends upon leg-

islative grace; [19] that only as a clear provision therefor can any particular deduction be allowed; and that the income tax statutes disclose a general purpose to confine allowable losses to the taxpayer sustaining them, the Supreme Court held that the section is free from ambiguity and clearly means that the deduction shall be allowed only to the taxpayer who sustained the net loss. The Court held that the new corporation was not, for all practical purposes, the same as the old one, regardless of the continuity of the business, stockholders and creditors. The old corporation was deserted and the new one regarded as a distinct entity free from the difficulties attending the old one. In law and in fact the two corporations were distinct, since the transaction was voluntary and contractual, not by operation of law. It was then concluded that the two corporations were not the same taxpayer.

Upon authority of *New Colonial Ice Co. Inc.*, *supra*, we hold that petitioner, the "C" company, is not entitled to a deduction in 1927 for any portion of a net loss sustained in 1925 by its predecessor, the "B" company. This conclusion obviates the necessity of determining the correct amount of the alleged net loss sustained by "B" company.

Enter:

ENTERED: Nov. 7, 1934

Judgment will be entered for the Respondent.

[20]

United States Board of Tax Appeals  
Washington

Docket No. 47419

CALIFORNIA BARREL COMPANY, INC.

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its memorandum opinion, entered November 7, 1934, it is

ORDERED and DECIDED: That there is a deficiency of \$14,915.65 for the year 1927.

[Seal]      (Signed) J. RUSSELL LEECH  
Member.

Enter:

ENTERED Nov. 8, 1934. [21]

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[Title of Court and Cause.]

PETITION OF CALIFORNIA BARREL COMPANY, INC., A CORPORATION, FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

To the Honorable the Judges of the United States Circuit Court of Appeals, Ninth Circuit:

Now comes California Barrel Company, Inc., a corporation, the petitioner in this cause, by Allen

G. Wright and Randell Larson, its attorneys, and respectfully shows:

I.

JURISDICTION FOR REVIEW

The petitioner, California Barrel Company, Inc., is a corporation duly organized and existing under and by virtue [22] of the laws of the State of California with its principal office in San Francisco, California. The respondent in this cause is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The income tax returns of the petitioner for the calendar year 1927, being the taxable year involved herein, were filed with the Collector of Internal Revenue for the First District of California on or about the 15th day of March, 1928 and the office of said Collector then was and now is located in San Francisco, California, within the Judicial Circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

This petition is filed in pursuance of the provisions of Sections 1001, 1002 and 1003, of the Act of Congress approved on the 26th day of 1926 entitled the Revenue Act of 1926 as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

The petitioner is aggrieved by a decision of the United States Board of Tax Appeals rendered November 8, 1934 in the appeal of the California Barrel Company, Inc., v. Commissioner of Internal



Revenue Docket No. 47419 and determining a deficiency in income and profits taxes for the calendar year 1927 in the sum of Fourteen Thousand Nine Hundred and Fifteen and 65/100 Dollars (\$14,915.65) and the petitioner respectfully submits its petition for a review thereof by the United States Circuit Court of Appeals, Ninth Circuit.

## II.

### NATURE OF THE CONTROVERSY [23]

The California Barrel Co. a corporation organized and existing under the laws of the State of California, hereinafter called the "A" company, had prior to August 28, 1924 acquired 8,000 shares of the capital stock of the Koster Products at a total cost of \$908,201.85. On August 28, 1924 the "A" company transferred all its assets and business to the California Barrel Company, Inc., a corporation organized February 15, 1924, and existing under the laws of the State of California hereinafter called the "B" company, including said 8,000 shares of the capital stock of the Koster Products, in consideration of the issue of 9,000 shares of the preferred stock of the "B" company to the "A" company and the issue of 995 shares of the common stock of the "B" company to the stockholders of the "A" company, as its nominees. No other stock was ever issued by the "B" company except 5 shares of common stock as qualifying shares to the directors of the "B" company who were also directors of the "A" company. The circumstances of this transfer made of the transaction a reorganization



within the meaning of Section 203 (h) (1), (B) and (i) of the Revenue Act of 1924, in which no taxable gain or loss could be recognized. Subsequently and prior to December 10, 1925 the "B" company acquired 50 additional shares of the capital stock of the Koster Products Company at a cost of Two Thousand Five Hundred Dollars (\$2500.00). On December 10, 1925 the "B" company sold its 8050 shares of the capital stock of the Koster Products Company for Sixty-four Thousand Four Hundred Dollars (\$64,400.00) taking a loss thereon of Eight Hundred [24] Forty-three Thousand Eight Hundred and One and 85/100 Dollars (\$843,801.85). A portion of this loss was asserted by the "B" company as a net loss during the year 1925. Had the "B" company continued its corporate activities in the years 1926 and 1927 it would have been entitled under authority of Section 206 (b) of the Revenue Act of 1926 to assert as a net loss in 1926 the portion of this loss which had not been asserted as a net loss in 1925 and in addition under authority of the section noted above any portion of this loss which had not been asserted as net losses in 1925 and 1926 could have been asserted by the "B" company as a net loss in 1927. It is the right to assert a portion of this loss as a net loss for the year 1927 which has been denied by the Board of Tax Appeals in its decision, the review of which is hereby petitioned.

The taxpayer, asserting a portion of this loss as a net loss in 1927 is not technically the "B" com-

pany, but the California Barrel Company, Inc. subsequently incorporated under the laws of the State of California, December 19th, 1925, hereinafter referred to as the "C" company. The "B" company and the "C" company were both organized under the laws of the State of California for the purpose of engaging in the manufacture and sale of barrels and cooperage. Both companies had the same stockholders holding preferred and common stock therein in substantially like proportions, and both were invested with like corporate powers in their articles of incorporation. The preferred stock of each had like preferences. The officers of [25] both companies were the same and the directors of both companies were the same except that for a matter of three months the Secretary of the "C" company substituted as a director of the "C" company for Krohn a director of the "B" company.

The "B" company transferred all its business and assets to the "C" company as of December 31, 1925 for shares of stock of the "C" company issued to the nominees of the "B" company, and in 1926 and 1927 the business of manufacturing and selling barrels and cooperage formerly conducted by the "B" company in 1925 was conducted by the "C" company with the assets of the "B" company so transferred to the "C" company December 31, 1925. The continuity of the business was not broken by this transfer from the "B" company to the "C" company and for all practicable purposes the "B"

company and the "C" company were identical and the same taxpayer.

The "C" company was organized by the "B" company on December 19, 1925 solely to provide a means for continuing the business enterprise of the "B" company during 1926 and succeeding years and for no other purpose. The organization of the "C" company and the transfer to it of the assets and business of the "B" company became necessary because the Secretary of State of California acting on an erroneous opinion of the Attorney General of California as to the law refused to recognize the "B" company as a corporation either de jure or de facto and refused accordingly to file its amended articles of incorporation when tendered in the latter half of 1925 which had been amended to conform to [26] the decision of the Supreme Court of the State of California in *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488, 238 Pacific 710, and refused to issue to the "B" company a license to do business as a corporation in 1926 as required by the provisions of the California Statutes (Stats. 1915, p. 422, Chap. 190, Stats. 1917, p. 371, Chap. 215) when the amount of the tax for such a license were tendered him in due season in December 1925 and he refused to receive the tax so tendered. By the provisions of the California Statutes a failure to pay this license tax made the corporate rights, privileges and powers of a domestic corporation, like the "B" company, suspended and incapable of being exercised. When the rights, privileges and



powers of a corporation were so suspended the statute provided that every person who attempted or purported to exercise any of the rights, privileges or powers of such a corporation was guilty of a misdemeanor and punishable by substantial fine or by imprisonment or by both and every contract made in violation of this statute, the statute itself expressly made void. It was in order to meet the foregoing situation that the "B" company organized the "C" company on December 19, 1925 and transferred its business and assets as of December 31, 1925.

The "B" company had been organized in 1924 with a capital stock whose preferred shares had a par value of \$100 each and common shares without a par value in conformity with certain sections of the California Civil Code (290 b, 290 c, 290 d, 290 e, and 290 f, added to the code in 1923; Stats. 1923 p. 621, Chap. 293). These sections of the Civil Code authorizing [27] the organization of corporations with a capital stock, some of which might have a par value and some of which might have no par value, were held to be unconstitutional under the California Constitution in the case of *Del Monte Light & Power Co. v. Jordan*, *supra*. But the "B" company was, notwithstanding that decision, at least a *de facto* corporation and as such it had the right, as it attempted, to amend its articles of incorporation to provide for a capital stock of preferred and common stock both with a par value of \$100 each to conform to that decision and as a *de facto* cor-

poration the "B" company had the right to have a license to do business during 1926 issued to it upon the tender which it made of the amount of the license tax prescribed therefor. Both rights were improperly and without warrant of law denied the "B" company, by the California Secretary of State as was later settled in 1926 in a case affecting a de facto corporation organized with a capital stock structure similar to that of the "B" company by the decision of the Supreme Court of California in *Westlake Park Investment Co. v. Jordan*, 198 Cal. 609, 246 Pac. 807.

Facing this predicament, and in order to avoid a disruption of its business from and after January 1, 1926, in order to avoid possible litigation over its future contracts, in order to void placing itself and its officers and employees in possible jeopardy of the penalties prescribed by the corporation licensing Statute of California, in order to continue its business enterprise, to protect its private rights, to safeguard the interest of its stockholders and creditors and to conserve its property interests, [28] and to avoid the expense, delay and uncertainty of likely litigation, the "B" company was forced in December 1925 to do something to meet that situation and it accordingly provided for the creation of the "C" company and the transfer of its assets and business to the "C" company as of December 31, 1925 as the only safe, certain and prompt solution of the problem with which it was confronted.

The question which has been raised as to the

right of the taxpayer, the "C" company, to assert the net loss in 1927 which it did assert in its 1927 income tax return, could never have arisen if the California Secretary of State had not, without warrant of law, denied to the "B" company its right to file with him its amended articles of incorporation and denied to the "B" company its right to a license to do business in 1926 when in due season it tendered him the prescribed license tax therefor.

The controversy in this case involves a question of law. The case was tried and submitted before the Board of Tax Appeals on an agreed statement of facts. A question was raised over what was the correct amount of the net loss sustained by the "B" company in 1925, but this question was not determined by the Board of Tax Appeals and, in the event of a reversal of the decision of the Board of Tax Appeals, which, upon the authority of the decision of the Supreme Court in *New Colonial Ice Company v. Helvering*, 292 U. S. 435, 54 Sup. Ct. 788, held that the "C" company was not entitled to a deduction in 1927 for any portion of a net loss sustained in 1925 by the "B" company, this case will probably have to be remanded to the Board of Tax Appeals for rehearing. [29]

The issue here is whether this case comes within the recognized exception to the general rule declared in *New Colonial Ice Co. v. Helvering*, *supra*, and whether or no, under the exceptional situation in this case, looking through form to substance, the substantial identity of the "B" company and the



“C” company and their identity as the same taxpayer should be recognized and whether or no that substantial identity should be recognized for the due protection of private rights, and whether, accordingly, the taxpayer, the “C” company, should or should not be permitted to assert the net loss for 1927 as claimed. The petitioner herein asserts the affirmative of this issue.

### III.

#### ASSIGNMENTS OF ERROR

The petitioner, hereinafter referred to as the taxpayer, says that in the record and proceeding before the United States Board of Tax Appeals and in the decision and order determining a tax deficiency of \$14,915.65 rendered and entered by the United States Board of Tax Appeals manifest error occurred and intervened to the prejudice of the taxpayer. The taxpayer assigns the following errors and each of them which it avers occurred in the said record, proceeding and order of determination of said deficiency and upon which it relies to reverse said decision and order of determination of said deficiency so rendered and entered by the United States Board of Tax Appeals, hereinafter referred to as the Board, to-wit:

(1) The Board erred in making and entering its decision in this cause and in entering judgment in favor of the [30] Commissioner and against taxpayer.

(2) The Board erred in its conclusions of law and its application of the law to the facts.

(3) The Board erred in that the opinion, decision and order of the Board are contrary to the evidence and are not supported by the evidence.

(4) The Board erred in that the opinion, decision and order of the Board are contrary to the facts stipulated in this case and are not supported by the facts stipulated in this case.

(5) The Board erred in determining a deficiency against this taxpayer for the year 1927 amounting to \$14,915.65.

(6) The Board erred in holding that the taxpayer hereinabove referred to as the "C" company was not entitled to a deduction in 1927 for any portion of a net loss sustained in 1925 by its predecessor hereinabove referred to as the "B" company.

(7) The Board erred in finding that the two corporations hereinabove referred to respectively as the "B" company and the "C" company were in fact distinct corporations.

(8) The Board erred in concluding that the said "B" company and "C" company were in law distinct corporations.

(9) The Board erred in concluding that the said "B" company and "C" company were not one and the same taxpayer.

(10) The Board erred in failing to find or conclude that there is no income tax due from the taxpayer for 1927. [31]



(11) The Board erred in not accepting and stating as its findings of fact all the facts stipulated in this case as the basis for its said opinion, decision and order.

(12) The Board erred in that the opinion and decision of the Board, based upon the facts stipulated in this case, are contrary to law.

WHEREFORE, the taxpayer petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of be reviewed and corrected by said Court.

ALLEN G. WRIGHT

RANDELL LARSON

1012 Mills Building

San Francisco, California

Counsel for Taxpayer-Petitioner [32]

State of California

City and County of San Francisco—ss.

FREDERICK J. KOSTER, being first duly sworn, deposes and says:

That he is the president of the California Barrel Company, Inc., the petitioner in the above named cause, and that as such president he is authorized to

verify the foregoing petition for review, and verifies the same for and on behalf of said petitioner; that he has read the said petition and is familiar with the statements contained therein and that the statements contained therein are true of his own knowledge, except as to those matters therein stated on information or belief, and as to those matters he believes them to be true.

FREDERICK J. KOSTER

Subscribed and sworn to before me this 18th day of January, 1935.

[Seal]

KATHRYN E. STONE

Notary Public in and for the City and County  
of San Francisco, State of California.

My Commission Expires March 1, 1937

[Endorsed]: Filed Jan. 29, 1935 [33]

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[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To Robert H. Jackson, General Counsel, Bureau of  
Internal Revenue, Washington, D. C.

PLEASE TAKE NOTICE that the petitioner on the 28th day of January, 1935, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the

Ninth Circuit of the decision of the Board heretofore rendered in the above entitled cause. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you. DATED at Washington, D. C. this 28th day of January, 1935.

Respectfully

ALLEN G. WRIGHT  
RANDELL LARSON

Counsel for Petitioner  
1012 Mills Building  
San Francisco, California

[34]

Personal service of the foregoing notice together with a copy of the petition for review and assignments of error mentioned therein is hereby acknowledged this 28th day of January, 1935.

ROBERT H. JACKSON  
Assistant General Counsel, Bureau of Internal  
Revenue, Counsel for Respondent

[Endorsed]: Filed Jan. 29, 1935 [35]

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[Title of Court and Cause.]

## STATEMENT OF EVIDENCE

Following is a statement of evidence submitted to the United States Board of Tax Appeals in the above mentioned case, so far as is necessary to the

assignment of error as filed, reduced to narrative form.

This cause came on for hearing before the Honorable Ernest H. Van Fossan, Member of the United States Board of Tax Appeals, on September 15, 1933, at San Francisco, California. Allen G. Wright, Esq., appeared for the petitioner and Allin N. Pierce Special Attorney Bureau of Internal Revenue, and E. Barrett Prettyman General Counsel Bureau of Internal Revenue, appeared for the respondent.

The cause was submitted on an agreed statement of facts and Exhibit 1 attached thereto and on Exhibits 2, 3, [36] 4, 5, 6 and 7 referred to therein, and attached thereto, and duly filed with said Board.

Exhibit 2 is the separate return for 1924 of the corporation hereinafter referred to as the "B" company, Exhibit 3 is the separate return for 1925 of the corporation hereinafter referred to as the "A" company, Exhibit 4 is the separate return for 1925 of said "B" company, Exhibit 5 is the separate return for 1925 of the corporation hereinafter referred to as the "C" company, Exhibit 6 is the consolidated return for 1926 of said "A" company and said "C" company, and Exhibit 7 is the consolidated return for 1927 of said "A" company and said "C" company.

The agreed statement of facts designated as a Stipulation of Facts and Exhibit 1 attached thereto was in the words and figures following, to-wit:



## STIPULATION OF FACTS

1. Petitioner is a corporation organized under the laws of California on December 19, 1925. During the years 1926 and 1927 it was engaged in the manufacture and sale of barrels and cooperage with principal offices at 433 California Street, San Francisco. During the taxable year 1927 it claims the right to deduct from its income, for Federal Tax purposes, an alleged statutory net loss resulting from the following facts which the parties hereto stipulate and agree to be true and correct: [37]

2. California Barrel Co. (in the petition and hereinafter referred to as the "A" company) was incorporated January 18, 1906, under the laws of the State of California for the purpose of engaging in the manufacture and sale of barrels and cooperage. During the year 1910 it acquired certain timber lands in the State of Oregon; and in 1918 it acquired certain other timber lands in the State of Washington. In the year 1918 it improved and equipped the Oregon lands with a railroad, logging equipment, machinery, etc. The adjusted cost of certain properties to the "A" company as of May 31, 1919, was as set forth in Exhibit 1 attached hereto and incorporated herein by reference.

3. On May 31, 1919, the "A" company transferred all of the foregoing properties, including plant and timber lands to the Koster Products Company, a corporation organized under the laws of the State of Nevada, in consideration for the issuance to



it by the latter company, of 3,000 shares of the common capital stock of the Koster Products Company, having a par value of \$100.00 per share; plus promissory notes of the said Koster Products Company in the sum of \$250,000.00. At the time received, the fair market value of the common capital stock of the Koster Products Company established by sales of said stock made to other parties was \$50.00 a share.

4. Following the said transfer, the Koster Products Company set up on its books, the assets received from the "A" company at a cost of \$400,000.00.

5. Prior to the transfer above mentioned, the "A" [38] company did not own any of the stock of the Koster Products Company. Immediately following the above mentioned transfer, the stock of the Koster Products Company was owned, as follows:

	Shares
California Barrel Co. ("A" company)	3,000
Stockholders of the "A" company	400
Non-stockholders of the "A" company	160
	<hr/>
Total	3,560

6. In November, 1919, the promissory note of the Koster Products Company which was delivered to the "A" company as part consideration for the said transfer of properties above referred to was paid by delivery to the "A" company by the Koster Products Company of 5,000 shares of the common capital

stock of the Koster Products Company at an agreed price of \$50.00 per share. Following said transaction, the 8,000 shares of the capital stock of the Koster Products Company was set up on the books of the "A" company at a total cost of \$400,000.00. There were no other changes in the stockholdings of the Koster Products Company.

7. On February 15, 1924, Articles of Incorporation of the California Barrel Company, Inc. (in the petition and hereinafter referred to as the "B" company) were filed with the Secretary of State of the State of California, who thereupon issued to the "B" company, a certificate under the seal of said state of the incorporation thereof. The purposes of the "B" company as provided for in these Articles of Incorporation were to engage in the manufacture and sale of barrels and cooperage. These Articles of Incorporation provided that the capital stock [39] of the "B" company was to consist of 18,000 shares, divided into 9,000 shares of preferred capital stock of a par value of \$100.00 per share, and 9,000 shares of common capital stock of no par value, both the preferred and common stock having voting rights. These Articles of Incorporation made provision for the preferences of the preferred stock and in that behalf made provision for accumulated dividends thereon at rates therein specified, for their redemption at par and unpaid accrued dividends and for a sinking fund plan to provide for their redemption. These Articles of Incorporation also provided that the holders of

the preferred stock in case of liquidation, dissolution or winding up were to be paid in value, both the par value of their stock and unpaid accrued dividends thereon before the payment of any amount to the holders of the common stock, and provided further that the holders of the common stock should not be entitled to receive any dividends thereon while any of the preferred shares were issued and outstanding, without the written consent of the holders of at least three-fourths of the issued and outstanding preferred shares.

8. Under date of August 28, 1924, the "A" company, pursuant to authorization of its directors and stockholders and all of its creditors, transferred to the "B" company all of its business and properties, including real estate, personal property, going concern value, goodwill, etc., and including the above mentioned 8,000 shares of the common capital stock of the Koster Products Company, in consideration of the issuance to the "A" company by the "B" company of 9,000 shares of its preferred [40] capital stock, and at the same time 995 shares of common capital stock of the "B" company issued to the stockholders of the "A" company as its nominees. At the same time 5 shares of the common capital stock of the "B" company were issued as qualifying shares to the directors and incorporators of the "B" company who were also directors of the "A" company. The remaining authorized capital stock of the "B" company remained unissued. The fair market value of the said shares of the common

capital stock of the Koster Products Company as of August 28, 1924 did not exceed the sum of \$15.00 a share.

9. This transfer of assets from the "A" company to the "B" company, in exchange for stock of the latter issued to the former, was made to make provision for the payment of debts to certain creditors of the "A" company, aggregating in excess of \$1,000,000.00. These debts arose out of the stockholders liability of the "A" company as a stockholder of the Koster Company, a corporation organized under the laws of the State of California, an insolvent corporation which discontinued its business in 1922. The "A" company upon receipt of said 9,000 shares of the preferred capital stock of the "B" company executed a trust agreement with the Bank of California National Association of San Francisco, as trustee, under date of September 22, 1924, under which it agreed to pay over to said trustee all payments received by it from the "B" company, whether dividends or redemption payments in trust to distribute and pay out the same ratably to the creditors of the "A" company therein listed as beneficiaries of the trust. The "B" company as part consideration for [41] the transfer aforesaid had agreed to assume all of the debts of the "A" company, except those listed and referred to in said trust agreement, the latter being debts arising out of the stockholder liability aforesaid. Following said transfer of assets the "A" company



continued its corporate existence and to pay annual franchise taxes.

10. In November, 1925, the "B" company acquired 50 additional shares of the common capital stock of the Koster Products Company from E. L. Kilbourne, an employee of the "B" company at the time of severing his employment from the "B" company, in settlement of a personal obligation of E. L. Kilbourne to the "B" company.

11. Under date of July 29, 1925, the Supreme Court of California rendered its decision in *Del Monte Light & Power Co. v. Jordan*, 196 Cal. 488. Shortly following said decision, the "B" company tendered to the Secretary of State of the State of California, amended Articles of Incorporation of the "B" company providing that its shares of common capital stock as well as its shares of preferred capital stock should have a par value of \$100.00 per share. The Secretary of State of California acting on the advise of the Attorney General refused to permit the said amended Articles of Incorporation to be filed by the "B" company on the ground that the "B" company was neither a de jure nor de facto corporation. The Secretary of State of California acting on the advice of the Attorney General of the State of California also refused to issue to the "B" company the statutory license to do business in California during the [42] calendar year 1926, when in due time in the month of December, 1925, the prescribed license fee was tendered to him. The license so refused was that required by the provisions



of California Statutes 1915, p. 422 (Chap. 190) as amended Statutes 1917, p. 371, (Chap. 215).

12. In order to meet the foregoing situation the "B" company caused to be incorporated under California laws on December 19, 1925, a corporation under the name of California Barrel Company, Inc. (in the petition and hereinafter referred to as the "C" company). The "C" company is the petitioner herein.

13. Under date of December 10, 1925, the "B" company transferred all of its shares of the capital stock of the Koster Products Company above referred to (8,050 shares) to O. R. Miller and C. L. Koster, for an agreed price of \$8.00 per share (a total consideration of \$64,400.00); payable \$40,000.00 in cash and the balance of \$24,000.00 in promissory notes of \$8,000.00, \$8,000.00, and \$8,400.00, maturing December 21, 1926, December 21, 1927, and December 21, 1928, respectively, with interest at the rate of 6% per annum. The title to the said stock was transferred by delivery of the said stock certificates duly endorsed by the "B" company. The promissory notes of O. R. Miller and C. L. Koster received as part consideration for the stock were made payable to the "B" company, and said promissory notes were duly paid at their respective maturity dates. To the date of said sale no dividends were ever declared or paid by the Koster Products Company on the stock so sold. [43]

14. The Articles of Incorporation of the "C" company authorized the "C" company to engage in

the business of the manufacture and sale of barrels and cooperage. It provided for an authorized capital stock of 18,000 shares divided into 9,000 shares of preferred capital stock, and 9,000 shares of common capital stock, both of a par value of \$100.00 a share and both having voting rights. It provided for the same preferences for its preferred shares as were provided for the preferred shares of capital stock of the "B" company.

15. The "B" company by a deed of conveyance dated December 29, 1925, transferred as of December 31, 1925, to the "C" company all of its assets in consideration for capital stock issued as follows:

9,000 shares of preferred capital stock to "A" company.

125 shares of common capital stock to Frederick J. Koster.

125 shares of common capital stock to B. J. Critcher, as Trustee for the stockholders of "A" company other than Frederick J. Koster, in proportion to their stockholdings in the "A" company.

The said deed of conveyance was executed by the "B" company as first party and grantor and the "A" company as second party and by the "C" company as third party and grantee. As further consideration for this transfer, the "C" company agreed to assume all of the liabilities of the "B" company. At the same time 5 qualifying shares of the common stock of the "C" company were issued

to its five incorporators and directors. The remaining shares of common stock of the "C" company remained unissued. No steps have been taken to dissolve the "B" company and no decree of court dissolving the same has even been entered. [44]

16. The "A" company upon receipt of 9,000 shares of the preferred capital stock of the "C" company executed a Trust Agreement with the Bank of California National Association of San Francisco, as Trustee, under date of February 26, 1926, under which it agreed to pay over to said Trustee all payments received by it from the "C" company as dividends or redemption payments in trust, to pay out the same ratably to the creditors of the "A" company therein listed as beneficiaries of the trust, which list was a duplicate of the list of beneficiaries in the former trust agreement with said bank of September 22, 1924, hereinabove referred to. The "A" company after receiving the 9,000 shares of the preferred capital stock of the "C" company as aforesaid, continued to hold the same until September 30, 1926, at which time through the retirement of 270 shares of said preferred stock, its holdings were reduced by that amount. Except for the retirement of said 270 shares, no change since September 30, 1926, has occurred in the "A" company's ownership of the "C" company's preferred capital stock.

17. Immediately prior to the said transfer of assets from the "B" company to the "C" company

the officers, directors, and stockholders of the "B" company were as follows:

#### Officers

Frederick J. Koster, President; S. P. White, Secretary; Wm. B. Duff, Vice-President; John A. Koster, Treasurer; H. F. Marten, Supt. San Francisco Branch; J. J. Krohn, Manager Arcata Branch.

#### Directors

Frederick J. Koster, Willard J. Growall, John A. Koster, William B. Duff, J. J. Krohn. [45]

#### Stockholders

"A" company—9,000 shares preferred stock. The aforesaid directors of the "B" company who were also the five directors and stockholders of the "A" company—1 share of common stock each. Frederick J. Koster, a stockholder of "A" company—505 shares of common stock. B. J. Critcher, Trustee, who held the stock as Trustee under a Trust Agreement between her and F. J. Koster for the stockholders of the "A" company other than Frederick J. Koster, in proportion to their stockholdings in "A" company—490 shares common stock.

18. Immediately following the said transfer of the assets by the "B" company to the "C" company, the officers, directors, and stockholders of the "C" company were as follows:

#### Officers

Frederick J. Koster, President; S. P. White, Secretary; Wm. B. Duff, Vice-President; John A.



Koster, Treasurer; H. F. Marten, Supt. San Francisco Branch; J. J. Krohn, Manager Arcata Branch.

#### Directors.

Frderick J. Koster, Willard L. Growall, John A. Koster, William B. Duff, Shelley P. White (later, March 25, 1926, succeeded by J. J. Krohn).

#### Stockholders

“A” company—9,000 shares preferred stock. Five directors of “C” company who were also directors and stockholders of the “B” company—1 share of common stock each,—5 shares common. Frederick J. Koster, a stockholder of “A” and “B” companies—125 shares common—B. J. Critcher, Trustee, who held the stock as a Trustee under a Declaration of Trust made by her for the stockholders of “A” company other than F. J. Koster, in proportion to their stockholdings in the “A” company—125 shares common.

19. The term of existence of the “B” company as provided in its Articles of Incorporation was 50 years from February 15, 1924, and the term of existence of the “C” company was 50 years from December 19, 1925.

20. For Federal income tax purposes, timely corporation income tax returns were filed for the calendar years 1924, 1925, 1926, and 1927 as follows, copies of which are hereto attached as Exhibits 2, 3, 4, 5, 6 and 7, respectively, all of which are made a part hereof:

1924—“B” company separate return—Exhibit 2

1925—“A” company separate return—Exhibit 3



1925—"B" company separate return—Exhibit 4

1925—"C" company separate return—Exhibit 5

1926—"A" company, "C" company consolidated  
return—Exhibit 6

"B" company, no return

1927—"A" company, "C" company consolidated  
return—Exhibit 7

"B" company, no return.

Nothing in this paragraph shall be deemed an admission by either party for the purposes of this appeal of the correctness of the returns so filed.

21. For Federal income tax purposes the "A" company and the "C" company filed consolidated corporation income tax returns for the calendar years 1926 and 1927, but neither of the companies did apply for, or receive from the Commissioner of Internal Revenue formal permission to file a consolidated income tax return for the calendar year 1926 or 1927.

22. As shown in the corporation income tax return of the "B" company for the calendar year 1925, a loss was claimed by said company on the sale of the capital stock of the Koster Products Company in the amount of \$846,461.85. As shown on the consolidated return of the "A" company and the "C" company, for the calendar year 1927, a statutory net loss was claimed by the petitioner ("C" company) in the amount of \$306,348.56 as a portion of the alleged loss shown on the [47] corporation income tax return of the "B" company for the calendar year 1925.

23. In the computation of taxable net income of the "C" company for the calendar year 1927 the Commissioner of Internal Revenue in his deficiency letter dated December 12, 1929, a copy of which is attached to the petition, and incorporated herein by reference, disallowed the amount of the said statutory net loss claimed by the "C" company as a deduction.

This appeal was filed with the Board of Tax Appeals with respect to respondent's disallowance of said statutory net loss.

DATED: September 14, 1933.

ALLEN G. WRIGHT

T. H. LAWRENCE

Counsel for Petitioner

E. BARRETT PRETTYMAN

General Counsel—Bureau of Internal Revenue  
—Counsel for Respondent. [48]

EXHIBIT 1

United States Board of Tax Appeals

Docket No. 47419

CALIFORNIA BARREL COMPANY, INC.

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

STATEMENT SHOWING COST OF TIMBER-  
LANDS SITUATE IN THE STATE OF

OREGON, AND IN THE STATE OF WASHINGTON TOGETHER WITH IMPROVEMENTS THEREON AND OTHER ASSETS WHICH WERE TRANSFERRED TO THE KOSTER PRODUCTS COMPANY ON MAY 31, 1919

Cost of Oregon timberlands	\$353,853.66	
Cost of Washington timberlands, acquired during 1918	28,573.00	\$382,426.66
	<hr/>	
Less depletion on timberlands to May 31, 1919		26,160.11
		<hr/>
Cost of timberlands, less depletion to May 31, 1919,		\$353,266.55
Cost of railroad, logging equipment, etc.:		
Current assets		92,258.27
Railroad, logging equipment, etc.	\$444,158.13	
Less depreciation to May 31, 1919	43,023.16	
	<hr/>	
Cost of other plant assets, less depreciation to May 31, 1919	\$401,134.97	
Less plant liabilities	108,285.58	
	<hr/>	
Net cost of plant		\$292,849.39
		<hr/>

Total cost of all assets exclusive of carrying charges noted below less depletion and depreciation to May 31, 1919	\$738,374.21
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In addition to the above costs the "A" company paid carrying charges consisting of interest, taxes, insurance, etc., from the date of the acquisition of the above described timberlands to May 31, 1919, as follows:

Carrying charges to 1910	\$ 56,904.00
Carrying charges years ended June 30, 1911, 1912, and 1913:	
Interest	\$ 62,274.94
Taxes	3,701.97
Other	17,453.69
	83,430.60
Carrying charges subsequent to 1913	29,493.04
Total	\$169,827.64

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[49]

I hereby certify that the foregoing is a true and correct statement of all the evidence adduced at the hearing before the United States Board of Tax Appeals which, with the exhibit hereto attached and those to be sent to the Court under its order, is ma-

terial to the assignments of error set out in the petition for review.

(Signed)    GEO. E. H. GOODNER  
Counsel for Petitioner.

I have no objection to the foregoing statement of evidence and the accompanying exhibit.

ROBERT H. JACKSON  
Assistant General Counsel for the Bureau of  
Internal Revenue. Counsel for Respondent.

Settled and approved this 26th day of February,  
1935.

(s)    J. RUSSELL LEECH  
Member, United States Board of Tax Appeals.

[Endorsed]:    Filed Feb. 26, 1935 [50]

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[Title of Court and Cause.]

PRAECIPE FOR RECORD

TO THE CLERK OF THE UNITED STATES  
BOARD OF TAX APPEALS:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of record in the above cause, prepared, certified and transmitted as required by law and by the rules of said Court, and to include in said transcript



of record the following documents or certified copies thereto, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination.

(b) Answer of respondent. [51]

(3) The memorandum opinion of the Board.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) Notice of filing petition for review.

(7) The statement of the evidence including the Stipulation of Facts and Exhibit 1 attached.

(8) This praecipe.

Will you also please forward to the Clerk of the Court, pursuant to the Court's order entered on or about February 19, 1935, the following original exhibits filed in this case at the hearing, viz.:

Exhibit 2—1924 Income Tax Return

(“B” company)

Exhibit 3—1925 Income Tax Return

(“A” company)

Exhibit 4—1925 Income Tax Return

(“B” company)

Exhibit 5—1925 Income Tax Return

(“C” company)

Exhibit 6—1926 Income Tax Return

(“A” and “C” company consolidated)

Exhibit 7—1927 Income Tax Return

(“A” and “C” company consolidated)

ALLEN G. WRIGHT

RANDELL LARSON

Attorneys for Petitioner

1012 Mills Building

San Francisco, California.

[Endorsed]:    Filed Feb. 26, 1935. [52]

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[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 52, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 1st day of April, 1935.

[Seal]

B. D. GAMBLE

Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 7826. United States Circuit Court of Appeals for the Ninth Circuit. California Barrel Company, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed April 8, 1935.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit.

